COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

SUFFOLK, ss. NO. 2019-P-1492

COMMONWEALTH

v.

AVERYK CARRASQUILLO,
Defendant-Appellant

BRIEF FOR THE DEFENDANT FOLLOWING A CONDITIONAL PLEA PURSUANT TO COMMONWEALTH V. GOMEZ, APPEALING A DECISION FROM THE SUFFOLK SUPERIOR COURT DENYING HIS MOTION TO SUPPRESS

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ISSUE PRESENTED

Whether evidence obtained by a Boston Police Department officer from the social media network Snapchat should have been suppressed, (1) because Mr. Carrasquillo had the constitutional right to prevent the government from accessing his private posts; and (2) because the Commonwealth failed to prove that Mr. Carrasquillo knowingly and voluntarily consented to befriending the officer, where the record lacked details about username and images associated with a police officer's fake account or what constitutional law enforcement purpose the ruse served.

STATEMENT OF THE CASE

On July 18, 2017, indictments issued (docket no. 1784CR00522) charging defendant Averyk Carrasquillo with three counts: (1) carrying a firearm without a license, second offense, in violation of G.L. c. 269 §§ 10(a), (d); (2) carrying a loaded firearm without a license in violation of G.L. c. 269 § 10(n); and (3) carrying a firearm without an FID card in violation of G.L. c. 269 § 10(h). (A. 7, 21-23, 25-26.)[1] On August 16, 2018, the grand jury submitted an armed career

[1] The transcript will be referenced as "Tr. [page]", and the record appendix as "A. [page]."

criminal enhancement to Count 1 pursuant to G.L. c. 269 § 10G. (A. 7, 24.)

On January 10, 2018, Mr. Carrasquillo filed a motion to suppress. (A. 10, 27.) He additionally filed a discovery motion to obtain more specific information about an account used by a police officer to access the social media site Snapchat, but the court only allowed the defense to obtain general information about that account. (A. 10; Tr. 7).

The Honorable Diane C. Freniere held an evidentiary hearing on the suppression motion on May 3, 2018. (Tr. 1.) At the conclusion of the hearing, she denied the motion and dictated her findings of fact and rulings of law on the record. (A. 30-41; Tr. 88-97.) A motion for interlocutory appeal was denied.

On March 26, 2019, Mr. Carrasquillo entered a conditional plea pursuant to *Commonwealth v. Gomez*, 480 Mass. 240 (2018), with the Commonwealth and court agreeing to allow him to appeal the denial of the motion to suppress. (A. 17-18, 28, 42.) He pled guilty to Count 1, firearm possession in violation of c. 269 § 10(a), with the Armed Career Criminal Act, Level I enhancement; and Count 2 as charged. (A.

17-18.) Count 3 was dismissed. (A. 17-18.)

Mr. Carrasquillo received a sentence of four to six years in state prison on Count 1 and probation from and after for one year on Count 2. (A. 17-18, 20.) He filed a timely notice of appeal. (A. 43.) The appeal was entered in this Court on October 11, 2019.

STATEMENT OF FACTS

This case concerns a video Mr. Carrasquillo posted on Snapchat, a social media application. (Tr. 13.)

According to Boston Police Officer Joseph Connolly, Snapchat allows users to send their social media "friends" real-time video and photographs through its app. (Tr. 12, 14). To become part of an existing user's network, a second person enters the user's unique screen name to request access, and the user opts whether to approve or reject the request. (Tr. 13). In this case, in April 2017, Officer Connolly requested to follow an individual with the Snapchat username "Frio Fresh." (Tr. 14.) The request was accepted. (Tr. 14.)

Officer Connolly testified that the screen name he used when making the friend request was a made-up name. (Tr. 15). Screen names, according to the officer, are often made-up names. (Tr. 13).

Officer Connolly chose his own own user name. (Tr. 35). According to the officer, "I just picked a random name, and I would argue it's not even a name so to speak, because similar to a lot of these social media applications you could say, you know, Roxbury Joe if you wanted to." (Tr. 35.) He did not use an actual photograph or bitmoji in association with his account. (Tr. 15.) Instead, he relied on the default picture, which he did not describe. (Tr. 15, 35.) The officer testified that he used this account to follow multiple people, but he did not choose the username based on the people he thought he might be following. (Tr. 33, 35.)

Prior to making his friend request to Frio Fresh, Officer Connolly could not view pictures or video from that account. (Tr. 33.) The officer subsequently viewed Snapchat videos from Frio Fresh. (Tr. 15-16).

Viewing these postings led the officer to believe that Frio Fresh was Mr. Carrasquillo. (Tr. 16).

Officer Connolly was familiar with Mr. Carrasquillo from an earlier policing experience when he was assigned to Mr. Carrasquillo's neighborhood. (Tr. 16-17.)

On May 10, 2017, around 2:20 p.m., Officer Connolly received on his account a video from Frio Fresh's account. (Tr. 17.) According to Officer Connolly, the video depicted "someone holding their phone facing down so you could see from like around mid-chest down of the person. You could see the pants, the bottom of the top layer of the sweatshirt that the person was wearing. You could see the belt, and the person was walking and put their hand in the pocket and pulled out a firearm." (Tr. 18.) Based on the background of that video, Officer Connolly suspected that it was recorded around 79 Freeport Street, which was an area that he knew Mr. Carrasquillo frequented. (Tr. 18). The Snapchat video indicated it had been recorded nine minutes earlier. (Tr. 18). Officer Connolly made a recording of the Snapchat video,[2] which was entered into evidence. (Tr. 19.)

[2] As the officer recognized, Snapchat videos generally are retained for only a short period of time. (Tr. 34.)

Officer Connolly was aware that Mr. Carrasquillo been previously convicted of felonies preventing him from legally possessing a firearm. (Tr. 20.) Based on information obtained from the original video and a subsequent post, Officer Connolly, his partner, and other officers traveled to the area around 79 Freeport Street. (Tr. 25-27.)

Following a chase, the police eventually seized Mr. Carrasquillo, who wore the same clothes as seen in the video posted earlier that day. (Tr. 47, 49, 50-51.) They seized a firearm from him. (Tr. 52).

Mr. Carrasquillo testified on his own behalf. He stated that when he signed up for Snapchat, his privacy settings would not allow people who were not "friends" to "see my Snap. You have to be friends with me to see -- like, to be able to watch my videos." (Tr. 62.) With this setting, only Snapchat friends could see the content that he posted. (Tr. 62). He had about 100 followers for his account. (Tr. 67.)

When asked about alternative "public" accounts, Mr. Carrasquillo described a different privacy option for select Snaps on his account: "The -- there's

another way too, like, I didn't see, like people, like, you can put, like, if you have Snap everybody could watch your Snap even if they're not friends." (Tr. 62).

His attorney followed up by asking if he used those settings. He replied, "I'm not too sure. I don't remember. . . . I know -- I know I had it private. I had it private, but yes, I think -- I believe I probably did at the time had it so everybody could watch my Snap." (Tr. 63.) He clarified that he had a private account, with occasional public posts. (Tr. 63.) On May 10, 2017, however, the videos he uploaded were limited to his friends. (Tr. 63, 64; A. 29.)

Mr. Carrasquillo also explained that he monitored his friend requests and would not accept a request from someone he did not know. (Tr. 64.) Generally, he recognized a person from the nickname they selected on Snapchat. (Tr. 66.) He would not have accepted a friend request from a police officer, and he did not know which account was used by Officer Connolly. (Tr. 65.)

Lower Court Ruling

The motion judge credited the testimony of Officer Connolly. (A. 31; Tr. 87.) She did not credit the testimony of Mr. Carrasquillo "on the key points of his privacy settings and whether he would have friended someone that he did not know." (A. 31; Tr. 87.) She explained:

> On direct examination, when asked about his snapchat privacy settings, the defendant initially testified, "I'm not too sure." And, "I don't know," when asked whether he had restrictions on the viewing of his videos. On another point, he testified, "Mine was private." Overall his testimony on this point did not persuade me given the other testimony before the Court that he was entirely aware of what his privacy settings were.
>
> In addition, the defendant testified that he only allowed people to view his snaps that he knew. I cannot reconcile this testimony with that of Officer Connolly who testified that he picked a user name that was not real, and that the image associated with the undercover account was a default assigned by snapchat.

(A. 31; Tr. 87.)

Among her findings, the judge determined that Officer Connolly used a "made up" identity on Snapchat with a default picture. (A. 32; Tr. 88.)

Her legal determination regarding suppression of the Snapchat video "hinge[d] on whether Mr. Carrasquillo has an expectation of privacy" in his

Snapchat postings. (A. 35; Tr. 91.) She determined that Mr. Carrasquillo lacked a subjective expectation of privacy because

> if the defendant has any privacy policy for his Snapchat account, which is doubtful based on the record before more, he did not follow his own policy of only friending people he knew. As I credit the testimony of Officer Connolly, that the username he used was not of a real person and made up[.] . . . [Applying *Commonwealth v. D'Onofrio*, 396 Mass. 711 (1986) to our facts], officer ruse is of no consequence in view of the insufficiency of the evidence to show reasonable enforcement of a policy to exclude persons from watching his Snapchat video other than those persons that he knew and accepted.

(A. 35-36; Tr. 91-92.)

She further concluded that any expectation of privacy was not objectively reasonable because "[t]he nature of Snapchat is sharing videos with other people, and even if the defendant only sent it to the people he says were following him, one hundred people by the defendant's own estimation, that was not . . . a reasonable preservation of his privacy in the video." (A. 36; Tr. 92.) The judge did not separately address the issue of "consent," the issue argued by the defense. (Tr. 72.)

ARGUMENT

THE CRITICAL EVIDENCE IN THIS CASE, A FIREARM, SHOULD HAVE BEEN SUPPRESSED BECAUSE THE COMMONWEALTH FAILED TO SHOW THAT MR. CARRASQUILLO CONSENTED TO ALLOWING A BOSTON POLICE OFFICER TO JOIN HIS PRIVATE SOCIAL MEDIA NETWORK, AND THE SEIZURE OF THE FIREARM WAS THE FRUIT OF THE OFFICER'S UNCONSTITUTIONAL ACT.

When a defendant accepts a plea pursuant to *Commonwealth v. Gomez*, 480 Mass. 240 (2018), the only issue on appeal is the propriety of the denial of a pre-trial motion. *Id.* at 252. In this case, a reversal of the order denying Mr. Carrasquillo's motion to suppress the firearm would be dispositive. *See Commonwealth v. Muckle*, 61 Mass. App. Ct. 678, 685 (2004). Specifically, it would render "the Commonwealth's case not viable" on any of Mr. Carrasquillo's charges and would permit the withdrawal of his guilty plea and the dismissal of the criminal complaint, pursuant to Mass. R. Crim. P. 12(b)(6).

As the judge explicitly recognized, in 2018, "there [was] no case law in this jurisdiction dealing with the facts as they present here today." (A. 35; Tr. 91.) She noted, particularly, that the law was silent on a social media user's reasonable expectation of privacy. (Tr. 4.) A recent federal case, however, has provided new guidance on how the Massachusetts

courts should approach this issue. *See generally United States v. Chavez*, 423 F. Supp. 3d 194 (W.D.N.C. 2019). While this Court gives deference to the judge's findings and credibility determinations, it nevertheless must review her ultimate findings and legal conclusions de novo. *See Commonwealth v. Jones-Pannell*, 472 Mass. 429, 436 (2015); *see Commonwealth v. Bookman*, 386 Mass. 657, 661 n. 6 (1982). Applying the legal principles suggested by *Chavez*, this Court should reverse the decision of the motion judge.

A. APPLYING RECENTLY ARTICULATED PRINCIPLES OF LAW FROM A FEDERAL COURT FOR ASSESSING A USER'S THE PRIVACY INTERESTS IN A SOCIAL MEDIA ACCOUNT, THIS COURT SHOULD CONCLUDE THAT MR. CARRASQUILLO'S MAY 10, 2017, SNAPCHAT POST WAS ENTITLED TO BE FREE FROM GOVERNMENT INTRUSION PURSUANT TO BOTH THE FOURTH AMENDMENT AND ARTICLE 14 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

"The Commonwealth bears the burden of proof to establish that a warrantless search was proper." *Commonwealth v. Arias*, 481 Mass. 604, 615 (2019) (internal quotations omitted). A threshold question, however, asks whether "a search in the Fourth Amendment [to the United States Constitution] sense occurred at all," with the burden of proof falling on the defendant. *Commonwealth v. Rodriguez*, 456 Mass. 578, 590 n. 12 (2010) (quoting *Commonwealth v.*

D'Onofrio, 396 Mass. 711, 714-15 (1986) (alteration in original)). To establish a violation of the Fourth Amendment, the defendant first must show either (1) a physical intrusion onto his personal property; or (2) a violation of his reasonable expectation of privacy. *See United States v. Jones*, 565 U.S. 400, 132 S. Ct. 945, 950 (2012); *see also Commonwealth v. Rousseau*, 465 Mass. 372 (2013) (discussing principles of *Jones* in the context of article 14).

Here, the facts establish that Mr. Carrasquillo's private Snapchat posts were entitled to protection against unwarranted intrusion by the government, pursuant to the Fourth Amendment and article 14 of the Declaration of Rights.

1. MR. CARRASQUILLO MAINTAINED A PROPERTY INTEREST TO PREVENT THE "PHYSICAL" INCURSION BY A GOVERNMENT AGENT INTO THE CONTENT OF HIS SOCIAL MEDIA ACCOUNT.

A recurring concern among the parties at the motion hearing was the lack of precedents relating to social media and the Fourth Amendment and article 14 of the Massachusetts Declaration of Rights. Since that time, one federal district court has ruled on a similar issue regarding a user's privacy interest in a social media account. *See Chavez*, 423 F. Supp. 3d

194. While the case lacks binding precedential value, it can provide this Court with guidance in approaching the issues.

In *Chavez*, the government suspected the defendant used Facebook to facilitate a wire fraud scheme. *See id.* at 198. A magistrate issued a search warrant to obtain documents relating to the defendant's account directly from Facebook. *See id.* at 199. The defendant filed a motion to suppress, and at the evidentiary hearing, he submitted documents describing Facebook's different privacy options. *See id.* at 200.

The first question addressed by the *Chavez* court was whether the defendant met his burden to establish a reasonable expectation of privacy. *See id.* at 201. Although the defendant did not argue the point, the *Chavez* court suggested that social media users have a Fourth Amendment interest to protect against the trespass of their personal property — the content of their posts. *See id.* at 201 n. 1 (quoting *Florida v. Jardines*, 569 U.S. 1, 5 (2013)). The court indicated this approach could be meritorious, because the Facebook Terms of Service allow a user to maintain

ownership over all posted content. *See Chavez*, 423 F. Supp. 3d 194 at 201 n. 1 (citing *United States v. Irving*, 347 F. Supp. 3d 615, 623 (D. Kan. 2018)).

Similarly here, according to its own terms of service, since 2017 Snapchat has allowed a user to maintain ownership over their posts, albeit with a limited license to the social media company. *See* https://web.archive.org/web/20170303173507/https://www.snap.com/en-US/terms/; *see also* https://www.snap.com/en-US/terms (current terms of service with identical language). The company states in section 3 of its privacy statement that the license "is for the limited purpose of operating, developing, providing, promoting, and improving the Services and researching and developing new ones." *Id.* Although Mr. Carrasquillo did not present these documents at the hearing, the Appeals Court may take judicial notice of these type of publicly available, non-adjudicative facts that are not subject to reasonable dispute. *See Dimino v. Secretary of Commonwealth*, 427 Mass. 704, 707 (1998) ("Factual matters which are 'indisputably true' are subject to judicial notice." (internal citation omitted)); *see, e.g.*,

Marhefka v. Zoning Bd. of Appeals of Sutton, 79 Mass. App. Ct. 515, 516-517 & n. 5 (2011) (appellate court took judicial notice of online database). Accordingly, this Court should recognize that the Snapchat terms granted Mr. Carrasquillo a property interest in his posts.

Employing the logic of *Jones*, the government may not physically trespass upon private property for the purpose of obtaining information related to suspected criminal activity. *See id.*, 132 S. Ct. at 950. Although there is no actual physical intrusion of digital data, *see Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 2489-90 (2014), Mr. Carasquillo can demonstrate an act by the government that could be analogized to a trespass of the private posts. Crediting the officer's testimony, the contents of Mr. Carrasquillo's Snapchat account were not visible to him until he "friended" Mr. Carrasquillo, and thus it was only by using a ruse to gain access to Mr. Carrasquillo's account — a "trespass" — that the officer gained access to the material to advance his criminal investigation.

Because Mr. Carrasquillo established that the government trespassed on his property, the burden shifts to the Commonwealth to prove existence of a warrant or a valid exception such as consent.

2. FOLLOWING THE APPROACH OF THE COURT IN UNITED STATES V. CHAVEZ, THIS COURT SHOULD CONCLUDE THAT MR. CARRASQUILLO MAINTAINED A SUBJECTIVELY AND OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY IN HIS PRIVATE SNAPCHAT POSTS, INCLUDING HIS PRIVATE POST FROM MAY 10, 2017.

As an alternative, Mr. Carrasquillo maintained a reasonable expectation of privacy in his non-public posts. *See Commonwealth v. McCarthy*, 484 Mass. 493, 497 (2020) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The *Chavez* court's reasoning on this issue is again instructive.

That court recognized that to determine whether a defendant "manifested a subjective expectation of privacy, courts consider whether the defendant intentionally 'took steps to avoid' 'allow[ing] the public at large to access' pertinent evidence." *Id.*, 423 F. Supp. 3d at 201-202 (citations omitted). Factually, a defendant must prove that he or she acted "with the intent to exclude the public

from accessing select content" on social media. *Id.* at 202. In the *Chavez* case, the defendant's privacy settings, which allowed only his 300 Facebook "friends" to see private posts even though some of his posts were available to the public, demonstrated his subjective expectation.[3] *See id.* at 200, 202.

Applying these principles to the facts of Mr. Carrasquillo's case, this Court should conclude he subjectively believed his private posts were free from government intrusion. The motion judge's findings explicit credited the officers's testimony while discrediting Mr. Carrasquillo's testimony. (A. 31; Tr. 87.) Thus, the only reliable evidence as to the privacy of the account was the officer's testimony indicating that Mr. Carrasquillo's Snapchat account, in general, was not a publicly viewable account. (Tr. 33.) The inference, then, would be that subjectively, Mr. Carrasquillo would not expect the public (including the officer) to see his private posts.

[3] The court recognized that a social media account can be mixed, with some posts private and others public. *See Chavez*, 423 F. Supp. 3d at 202. The act of making some posts public, however, does not prevent a court from finding an expectation of privacy in non-public posts. *See Commonwealth v. Kaupp*, 453 Mass. 102, 107 (2009) (differentiating between private content and publicly shared content on a computer network).

Despite these credibility determinations, the judge nevertheless construed some of Mr. Carrasquillo's testimony against him. She determined that she did not believe that Mr. Carrasquillo "was entirely aware" when his posts were private or public. Yet on this point, she ignored his testimony that the singular video in question was set to private. *See Jones-Pannell*, 472 Mass. at 431, 436. Thus, whether he sometimes made posts public or not, the only post that mattered was the one that led to his arrest, and his testimony was not in doubt on this point. (Tr. 63, 64; A. 29.) For that post, he maintained a subjective expectation of privacy.

This expectation of privacy having been established, this Court should next determine whether it was objectively reasonable. The *Chavez* court's reasoning is again instructive. There, the court looked at historic comparisons. *See id.*, 423 F. Supp. 3d at 203. It noted that letters, in transit, are entitled to a reasonable expectation of privacy even they are entrusted to an intermediary. *See id.* The use of telephone wires, as well, to place a phone call does not vitiate the reasonable expectation of privacy

that the conversation will not be "broadcast to the world." *Id.* (citing *Katz*, 389 U.S. at 361). Similarly, "it is objectively reasonable for an individual to expect privacy in non-public content that is entrusted to a social media website as the intermediary of the ultimate recipient." *Chavez*, 423 F. Supp. 3d at 203.

Furthermore, the *Chavez* court determined the sharing of posts with hundreds of "friends," including people with whom the defendant had little real-world relationship, did not invalidate the expectation of privacy. *See id.* at 204. That is because "[i]ndividuals — not the Government — are responsible for determining which relationships are worthwhile." *Id.*; *see also Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (Fourth Amendment secures "privacies of life" against "arbitrary power," and Framers intended Fourth Amendment to discourage "too permeating police presence" (quotations omitted)).

With *Chavez* as a guide, this Court too should conclude that Mr. Carrasquillo had an objectively reasonable expectation of privacy in his posts set to

"private," which included the video at the heart of this case.

In her decision, however, the motion judge, questioned whether Mr. Carrasquillo's policy of accepting friend requests from unknown persons would nullify any expectation of privacy. It would not. First, the fact he had a policy at all indicates that he maintained an account set to "private" by default, which he subjectively and objectively believed was free from government intrusion. The key question for this Court is the type of privacy setting (public or private) attached to the account, not how he implemented his friend requests. *See United States v. Meregildo*, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2012).

Second, the judge's question puts the cart before the horse: Did Mr. Carrasquillo regularly accept friend requests from anyone who asked? Did he accept a friend request from an unknown officer? Or factually, did the officer create a ruse and pretend to be someone Mr. Carrasquillo knew? Did the officer's other Snapchat "friends" make his account appear to be familiar to Mr. Carrasquillo? These are questions of consent — not questions of the reasonableness of his

belief his most of his videos were set to private, available to be viewed only by people he friended.

The motion judge's approach also relied on two cases, which differed significantly with the facts in Mr. Carrasquillo's matter.

First, she looked to *D'Onorfrio*, where the Supreme Judicial Court analyzed a club's failure to enforce an admittance policy and concluded that its principals could assert no reasonable expectation of privacy. *See id.*, 396 Mass. at 716-17. *D'Onofrio* differed from Mr. Carrasquillo's case in a significant way, one which was emphasized by the Court in its decision: the club was a *commercial* establishment. *See id.* at 717 (emphasis added). As such, a presumption existed that the public could enter. *See id.* at 717-18; *see also Commonwealth v. Cadoret*, 388 Mass. 148, 150 (1983) (discussion of public status the same club). The defendant in *D'Onofrio* had to rebut this presumption, and the absence of proof that the club enforced its policy led to the Court's conclusion.

Clearly, the expectation of privacy presumed for a business open to the public could not be considered

coextensive with the presumption of privacy on a social media account. Unless the account itself was presumptively "public" (as could be the case with a public figure), such analogy to a commercial establishment is inapt. Here, the facts established that Mr. Carrasquillo's account was a private one with occasional public posts, based on the testimony of Mr. Carrasquillo as well as the Commonwealth's own witness.

A second case cited by the motion judge, *Commonwealth v. Yehudi Y.*, also differed on its facts. *See id.*, 56 Mass. App. Ct. 812 (2002). This Court itself noted *Yehudi Y.*'s limited holding. *See id.* at 815-16. There, the Commonwealth provided proof of admittance of multiple people who did not live in the home, knowledgeable acquiescence by a co-conspirator to the presence of the police officer, and use of the private residence for a business. *See id.* at 815. The open door was the customary manner for non-residents to enter. *See id.* Moreover, some of the protections of the home likely were diminished due to the illegal use of the premises. *See Lewis v. United States*, 385 U.S. 206, 211 (1966) ("But when, as here,

the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.").

To translate the facts of *Yehudi Y.* to the language of social media, the teenagers in private home maintained what essentially was a public social media account.

Consequently, these cases, which the motion judge acknowledged were not controlling to this matter, provided poor guidance for considering the privacy expectations of a social media account. This Court should follow the federal case, and applying its logic, conclude that Mr. Carrasquillo has a reasonable expectation of privacy in his May 10, 2017 post.

B. BECAUSE THE COMMONWEALTH FAILED TO MEET ITS BURDEN TO SHOW THAT MR. CARRASQUILLO VOLUNTARILY AND KNOWINGLY CONSENTED TO THE POLICE OFFICER'S "FRIEND" REQUEST, AND BECAUSE THE RUSE ITSELF WAS CONSTITUTIONAL, THE OFFICER'S UNWARRANTED VIEWING OF MR. CARRASQUILLO'S SOCIAL MEDIA POST ON SNAPCHAT VIOLATED THE FOURTH AMENDMENT AND ARTICLE 14.

Warrantless searches, such as occurred here, are presumptively unreasonable. *See Commonwealth v.*

Almonor, 482 Mass. 35, 49 (2019). Where the Commonwealth relies on consent to justify entry, it must prove it "was, in fact, freely and voluntarily given." *Commonwealth v. Rogers*, 444 Mass. 234, 237 (2005) (quoting *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968)). This determination is made by examining the totality of the circumstances, and the Commonwealth must prove voluntary consent by a preponderance of the evidence. *See Rogers*, 444 Mass. at 249-50 (Greaney, J., dissenting) (citing *Commonwealth v. Gaynor*, 443 Mass. 245, 253 (2005)).

The Commonwealth never introduced specific evidence to support its theory of consent. *Contrast Commonwealth v. Goggin*, 412 Mass. 200, 201-203 (1992) (ruse in which officer gained entry to apartment to execute a warrant by announcing "Somerville Pop Warner"); *Commonwealth v. Sepulveda*, 406 Mass. 180, 181 (1989) (undercover officer gained consent to enter a home by pretending to be a drug user); *D'Onofrio*, 396 Mass. at 716 (undercover officer entered club after lying about an association with a member and signing a false name); *Commonwealth v. Villar*, 40

Mass. App. Ct. 742 (1996) (police positioned arrestee in front of keyhole to get access to apartment where drugs were sold). In this case, Mr. Carrasquillo sought discovery prior to the motion to suppress hearing regarding the police officer's username and the image associated with the account. The judge permitted him access only to general information about the police officer's account.

A few vague facts emerged from the hearing. The officer testified that his user name referenced a made-up person; the judge credited this testimony. Nevertheless, the officer acknowledged using some information connected to the neighborhood (like "Roxbury Joe") to select his name. He gave little other indication about the username, nor did he describe the default picture associated with the account. He also indicated also that he followed several people, but offered no testimony about whether this network would allow Mr. Carrasquillo to presume he knew the officer in real life or at least had acquaintances in common. Given the paucity of information at the motion hearing, the Commonwealth could not carry its burden to prove that the officer's

Snapchat account had no apparent connection to someone Mr. Carrasquillo knew. *See Rogers*, 444 Mass. at 250.

Furthermore, the actual name selected by the officer is consequential to the issue of the voluntariness of consent. *Cf. Commonwealth v. Ewing*, 67 Mass. App. Ct. 531, 540 (2006), *aff'd*, 449 Mass. 1035 (2007) (determining that a police ruse is acceptable where facts show no coercion). Depending on the identity chosen, the officer's Snapchat account could look less like a stranger to Mr. Carrasquillo, and more akin to an officer donning a lifelike mask of a family member to trick a defendant to opening a door, or a government official using a voice modifier to sound like Mr. Carrasquillo's friend. These situations rely on a level of trickery that is inherently coercive, and the Commonwealth would need to demonstrate other facts for the court to conclude his consent was voluntary under the circumstances.

Moreover, in this case the officer's ruse allowed him full access to search Mr. Carrasquillo's social media account. The purpose of the ruse was not merely the equivalent getting Mr. Carrasquillo to "open the door" of an apartment a crack to to see who was

present, but actually allowing the officer inside to look around the closets and cupboards. *Cf. Villar*, 40 Mass. App. Ct. at 747 (determining that if occupants of apartment saw acquaintance in the peephole, police ruse resulted only in occupants' opening of the door, not officers' illegal entry) (citing *United States v. Rengifo*, 858 F.2d 800 (1st Cir. 1988) (officers placed a call to motel pretending defendants' boat was endangered, which prompted occupants to leave room)). And unlike the series of "knock and announce" warrant cases sanctioned by the Supreme Judicial Court, the ruse in Mr. Carrasquillo's case resulted in a full, warrantless search following entry, which is a far more significant government intrusion than existed in those cases. *See, e.g.*, *Goggin*, 412 Mass. 200; *Sepulveda*, 406 Mass. 180; *Commonwealth v. Cundriff*, 382 Mass. 137, 139 (1980). The ruse was unconstitutional here because it went far beyond allowing the government to obtain "consensual entry." *Commonwealth v. Ramos*, 430 Mass. 545, 550 (2000) (citation omitted).

Finally, the officer himself never indicated that he suspected Mr. Carrasquillo of illegal activity

prior to executing the ruse. This fact alone should render the ruse unconstitutional. The officer never explained what made him target "Frio Fresh" in the first place, and his testimony clearly indicated that did not know before his "friend" request was accepted that Frio Fresh was Mr. Carrasquillo's user name. In all the "ruse" cases in the Commonwealth, the police had reason to suspect criminal conduct before engaging in their trickery. *See generally* cases cited *supra*; *see also Commonwealth v. Simpkins*, No. 18-P-1657, at 2 (Mass. App. Ct. Mar. 27, 2020) (rule 1:28 decision) (ruse attracted only suspects interested in engaging in illegal prostitution).

Although suspected criminal conduct may not be a precondition to a ruse under the Fourth Amendment, *see United States v. Raines*, 536 F. 2d 796, 799 (8th Cir.), *cert. denied*, 429 U.S. 925 (1976), this Court can determine that such limitation is mandated by article 14. To hold otherwise would allow a police officer to pretend to be someone he or she were not, simply to get access to the personal property, effects, or even home of any citizen and suss out whether any contraband were in plain view. Such

government overreach is at odds with the purpose of article 14. *See McCarthy*, 484 Mass. at 498-99; *Commonwealth v. Blood*, 400 Mass. 61, 71 (1987).

Given that the Commonwealth did not satisfy its constitutional burden, the Snapchat evidence cannot be relied upon to support the subsequent search. *See D'Onofrio*, 396 Mass. at 713. With the observation of firearm possession removed from the equation, there was no basis to search Mr. Carrasquillo on the street. *See Commonwealth v. Warren*, 475 Mass. 530, 538 (2016) (flight alone insufficient). Accordingly, the in-person search was the "fruit of the poisonous tree" and that evidence must be excluded. *See Commonwealth v. Fredericq*, 482 Mass. 70, 78 (2019). Without that evidence, the Commonwealth could not establish Mr. Carrasquillo committed any crime and this case must be dismissed. *See Muckle*, 61 Mass. App. Ct. at 685.

CONCLUSION

For the foregoing reasons, this Honorable Court should vacate the judgment of the trial court, reverse the denial of the motion to suppress, and order the case be dismissed.

Respectfully submitted,

Averyk Carrasquillo
By his attorney,

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September 21, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k). Page limit compliance was achieved by use of a 12-point monospaced font, spacing not exceeding 27 lines of double-spaced text per page (3 lines per vertical inch), with 1 1/2 inch left and right margins, 1 inch top and bottom margins.

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ADDENDUM

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Massachusetts Declaration of Rights, Article XIV

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws

Massachusetts Rule of Criminal Procedure 12(b)(6)

With the written agreement of the prosecutor, the defendant may tender a plea of guilty or an admission to sufficient facts while reserving the right to appeal any ruling or rulings that would, if reversed, render the Commonwealth's case not viable on one or more charges. The written agreement must specify the ruling or rulings that may be appealed, and must state that reversal of the ruling or rulings would render the Commonwealth's case not viable on one or more specified charges. The judge, in an exercise of discretion, may refuse to accept a plea of guilty or an admission to sufficient facts reserving the right to appeal. If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea or the admission to sufficient facts on any of the specified charges. If the defendant withdraws the

guilty plea or the admission to sufficient facts, the judge shall dismiss the complaint or indictment on those charges, unless the prosecutor shows good cause to do otherwise. The appeal shall be governed by the Massachusetts Rules of Appellate Procedure, provided that a notice of appeal is filed within thirty days of the acceptance of the plea.

in my case at 2 p.m. today. You may come, or you're not required to be here, but I am going to read it into the record at that time.

MS. FITZGERALD: Okay.

THE COURT: Anything else?

MS. FITZGERALD: No, Your Honor.

MS. HACKETT: Nothing.

COURT OFFICER: Court, all rise. Court will stand in recess.

(Recess taken.)

THE COURT: I'm here to issue today on May the 3rd of 2018, an oral decision which will -- a transcript will be ordered in the case of Commonwealth v. Carrasquillo, C-A-R-R-A-S-Q-U-I-L-L-O, Criminal Action Number 170052, and I am in Courtroom 713 of Suffolk Superior Court.

It's Criminal Action Number 17CR0522. 522.

I held a hearing this morning on the defendant's motion to suppress that had two components.

First was an improper search of the defendant's -- an allegation of an improper search of the defendant's snapchat account.

And, second, the improper seizure of the defendant without reasonable suspicion or probable cause to arrest.

At hearing, the Court heard from -- testimony of three witnesses, Officer Joseph Connolly, Officer Sean McCarthy, and

the defendant, Carrasquillo.

I credit and accept the testimony of Officers Joseph Connolly and Sean McCarthy, both experienced officers and members of the Youth Violence Strike Force. Officer Connolly serving for twelve years, and Officer McCarthy for twenty-one years.

With regard to the testimony of the defendant, on the key points of his privacy settings and whether he would have friended someone that he did not know, I do not credit the defendant's testimony.

On direct examination, when asked about his snapchat privacy settings, the defendant initially testified, "I'm not too sure." And, "I don't know," when asked whether he had restrictions on the viewing of his videos.

On another point, he testified, "Mine was private." Overall his testimony on this point did not persuade me given the other testimony before the Court that he was entirely aware of what his privacy settings were.

In addition, the defendant testified that he only allowed people to view his snaps that he knew. I cannot reconcile this testimony with that of Officer Connolly who testified that he picked a user name that was not real, and that the image associated with the undercover account was a default assigned by snapchat.

I make the following findings of fact based on the

evidence that I find credible.

Sometime in April, 2017, Officer Connolly acting in an undercover capacity requested to follow and was accepted as a friend of "Frio Fresh," F-R-I-O, F-R-E-S-H.

In making the request to friend Frio Fresh, Officer Connolly used a made-up identity. The photograph assigned to Officer Connolly's made-up identity account was a default one assigned by the snapchat application.

Officer Connolly was familiar with the defendant, Carrasquillo, having known him since he was 12 or 13 years old, some seven to eight years. He knew the defendant and he knew his two brothers. Based on the videos Officer Connolly observed on the Frio Fresh snapchat account, and his knowledge of the defendant, Officer Connolly believed the Frio Fresh account to be operated by defendant, Carrasquillo.

Mid-afternoon on May 10th 2017, Officer Connolly viewed a snapchat. The video entered into evidence as Exhibit 1 appeared to be taken by a person, phone facing down. The video captures the area mid-chest and the person is wearing white pants, a long sleeved black top and a belt buckle with a distinctive H logo. In the video, the person has his hands in his right pocket and while walking, pulls out a silver revolver from his right pant pocket. Officer Connolly viewed this snapchat video post nine minutes after it was posted. Officer Connolly knew the defendant had prior felony

convictions and did not have a license to carry a firearm.

After viewing a separate snapchat video from the Frio Fresh account, which Officer Connolly observed but which was deleted before he was able to record it, Officer Connolly believed that the defendant was located at 79 Freeport Street in Dorchester at the Inner City Weightlifting Gym. This belief was formed based on his knowledge that the defendant frequented that gym, and his knowledge of the interior space and exterior awning of the gym.

Officer Connolly alerted his partners on the Youth Violence Strike Force and other members of the Boston Police of his observations and shortly thereafter went to the area of 79 Freeport Street. Other Youth Violence Strike Force Officers sent up surveillance in the Freeport Street area, and a short time later, Youth Violence Strike Force Officers observed the defendant walking down Freeport Street wearing a black hoodie, white pants and a belt which an H belt buckle, the same clothes as the person depicted in the Frio Fresh snapchat video, and they approached him by car.

Specifically, Officer McCarthy and Officer Delahanty approached in an unmarked SUV. As they approached, Officer Delahanty observed the defendant tapping his right pocket and told Officer McCarthy what he'd seen. Officer McCarthy was familiar with the defendant from prior law enforcement interactions including Operation Night Light.

The officers followed the defendant through a parking lot and on to Ellsworth Street and pulled their vehicle up next to the defendant who was walking on the sidewalk with earbuds in his ears. There was a car separating the defendant on the sidewalk from the officers in their vehicle. If -- the defendant turned towards the officer's car and spotting them, appeared visibly startled and wide-eyed. Officer Delahanty asked the defendant, "What's up man?" And the defendant ran in the opposite direction on Ellsworth Street. Officer McCarthy got out of his vehicle and began to chase. Officer McCarthy did not order the defendant to stop, nor did any other officers order the defendant to stop at any time.

As he chased, Officer McCarthy observed that the defendant was holding his cellphone in his right hand, elevated in front of him with the screen illuminated in a way that made the officer believe that the defendant was recording the foot chase.

Thirty-five to fifty yards up Ellsworth Street, the chase came to an end when other officers of the Youth Violence Strike Force pulled a police vehicle on to the sidewalk blocking the defendant from running further. Officer McCarthy then caught up to the defendant, pulled him to the ground, face down and cuffed him. He then rolled the defendant over, and when he did so, he observed the handle of a firearm in the defendant's right pant pocket which he recovered.

I now move on to my rulings of law.

I first want to address the defendant's request to suppress the evidence seized through snapchat. The question here is whether there was a search at all. And the answer to that question hinges on whether there was an expectation of privacy.

It is the defendant's burden to show that he has an expectation of privacy, and I cite to Commonwealth v. D'Onofrio, D-'-O-N-O-F-R-I-O, 396 Mass. 711 at 715. If the defendant cannot meet this burden, no search in the constitutional sense is involved.

The expectation of privacy analysis is a two part analysis.

First, does the defendant have a subjective expectation of privacy? I find that he did not. If the defendant had any privacy policy for his snapchat account, which is doubtful based on the record before me, he did not follow his own policy of only friending people that he knew. As I credit the testimony of Officer Connolly, that the username he used was not of a real person and was made up, although there is no case law in this jurisdiction dealing with the facts as they present here today, I am applying the law of Commonwealth v. D'Onofrio to our facts. And under that case law also, officer ruse is of no consequence in view of the insufficiency of the evidence to show reasonable enforcement of a policy to exclude

persons from watching his snapchat videos other than those persons that he knew and accepted.

I also note Commonwealth v. Hines, 437 Mass. 54 at 62 note 4.

And I note Commonwealth v. Kaupp, K-A-U-P-P, 453 Mass. 102 at 107, 2009.

And Commonwealth v. Yehudi, Y-E-H-U-D-I, 56 Mass. App. Ct. 812. 815-816, 2002.

As to the second prong, I find that even if the defendant had subjectively reasonable expectation of privacy, which I find that he did not, that expectation is not one that society objectively recognizes as reasonable. The nature of snapchat is sharing videos with other people, and even if the defendant only sent it to the people he says were following him, one hundred people by the defendant's own estimation, that was not reasonable -- a reasonable preservation of his privacy in the video.

Thus, the credible evidence at the hearing today was insufficient to warrant a finding that a search was made, and I will not suppress the snapchat video evidence.

Moving to the defendant's motion to suppress the evidence recovered as a result of the defendant's allegedly unconstitutional seizure. To justify a police investigatory stop under the 4th Amendment or Article 14, the police must have a, "Reasonable suspicion that the person has committed,

is committing or is about to commit a crime." Commonwealth v. Costa, 448 Mass. 510, 514, 2007.

Reasonable suspicion must be based on specific and articulate facts which taken together with rationale inferences from those facts reasonably warrant an intrusion. Terry v. Ohio, 392 U.S. 1 at 21 through 22, 1968. We view the facts and inferences underlying an officer's suspicion as a whole when assessing the reasonableness of his acts. Whether the facts and circumstances known to the police constitute reasonable suspicion is measured by an objective standard. The evidence to establish a reasonable suspicion, while less than that necessary to show probable cause, requires information supporting the officers' suspicion have an indicia of reliability.

Police have served a person and seized a person in a constitutional sense only if in view of all the circumstances surrounding the incident a reasonable person would believe that he was not free to leave. Under this test, police do not effectuate a seizure merely by asking questions, unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe that he was not free to turn his back on his interrogator and walk away.

Applying this test to the case at bar, I find that Carrasquillo was not seized when Officers McCarthy and Delahanty initially approached him on Ellsworth Street.

Officer Delahanty's question, "Hey what's up?" did not constitute a show of authority that would indicate to a reasonable person in Carrasquillo's position that he was not free to leave. Commonwealth v. Gomes, 453 Mass. At 510.

Moreover, Officer McCarthy's pursuit of Carrasquillo absent any commands or show of authority is not enough to rise to the level of seizure. See Commonwealth v. Franklin, 456 Mass. 818, 823, 2010.

I find that Carrasquillo was not seized until Officer McCarthy caught up with him and brought him to the ground. See Commonwealth v. Resende, 474 Mass. 455, 461, 2016.

This physical contact of bringing him to the ground had a compulsory dimension to it that Officer McCarthy's initial approach by getting out of his vehicle, and Officer Delahanty's question to Carrasquillo did not. And no reasonable person would have felt that he -- and no reasonable person would have felt -- such that no reasonable person would have felt that he was free to leave.

By this time, however, the stop was constitutionally permissible because Officer McCarthy reasonably suspected that Carrasquillo was engaged in criminal activity, namely that Carrasquillo had been armed with a firearm and that he was unlicensed.

In that regard, Youth Violence Strike Force Officer -- Officers, among them Connolly, McCarthy and Delahanty, had

observed the following.

One, Officer Connolly viewed a snapchat video from what he believed to be Carrasquillo's snapchat account of him holding a silver revolver, which officer Connolly viewed nine minutes after it was posted.

Two, Officer Connolly recognized the location of the snapchat to be a workout club located at 79 Freeport Street, Dorchester, and after a short while of surveillance, Youth Violence Strike Force Officers located Carrasquillo in the vicinity of that club wearing the same clothing as the individual in the video.

Three, Officer Connolly was aware that Carrasquillo had prior felony convictions and thus could not lawfully carry a firearm.

Four, as defendant Carrasquillo walked, as observed by Officer Delahanty, he tapped his right pocket, and when Carrasquillo spotted the Youth Violence Strike Force Officers in their vehicle, and when they asked, "Hey, what's up?" He looked startled and his eyes wide. When officers asked Carrasquillo what's up, he took flight.

When Officer McCarthy brought the defendant to the ground and turned him over, he observed the butt of a firearm protruding from Carrasquillo's right pant pocket.

For all of these enumerated reasons, and citing to Commonwealth v. Johnson, 88 Mass. App. Ct. 705, 712 at 2015,

for the proposition that the test for determining reasonable suspicion should include consideration of the possibility of the possession of a gun, and the government's need for prompt investigation, I find that the officers' acts were justifiable.

Apply his training and experience to these observations, Officer McCarthy reasonably concluded that Carrasquillo was armed. See Resende, 474 Mass. At 461.

And Commonwealth v. Garcia, 88 Mass. App. Ct. 307, 312, 2015.

And Commonwealth v. Jeudy, J-E-U-D-Y, 75 Mass. App. Ct. 569, 583 at 2009.

Assessing all of the circumstances known to the police at the time, I find and rule that there were specific and articulable facts from which objectively considered, a reasonable suspicion existed that Carrasquillo was involved in the illegal possession of a firearm, thus, Officer McCarthy's stop of Carrasquillo was entirely proper. Once stopped, Officer McCarthy observed the butt of a firearm protruding from the defendant's right pant pocket. His pat frisk and the removal of the firearm was entirely proper. Officers then had probable cause to arrest the defendant for unlicensed possession of a firearm and were thereafter authorized to take the firearm as evidence of the crime.

The defendant argues that the seizure occurred when the

police ran after the defendant at the sight of the police. I do not agree. There was no seizure when the police ran after the defendant at the sight of the police officers if he even knew they were police officers because the police officers did not direct the defendant to stop or use any other show of authority. Commonwealth v. Perry, 62 Mass. App. Court. 500, 2004.

I will order the transcript of this -- of this hearing now in Court, and the Court reserves the right to supplement or revise the transcript upon the Court's review.

That transcript will stand as the memorandum of decision in this case, and hopefully ensure that the parties meet their trial date of May 21st.

(Adjourned)

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1657

COMMONWEALTH

vs.

SHAKWAAN I. SIMPKINS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Shakwaan I. Simpkins, was convicted of trafficking of persons for sexual servitude in violation of G. L. c. 265, § 50 (a). He argues on appeal that the trial judge abused his discretion to prematurely conclude the jury empanelment process. He also challenges (1) the introduction of prior bad acts evidence, (2) the judge's limiting of the scope of cross-examination of two police officers, and (3) the denial of his motion in limine to exclude "all evidence obtained as a result of egregious government conduct." We affirm.

Background. A juror could have found the following facts. In November 2015, the Burlington Police Department (BPD) began an undercover operation that targeted individuals purchasing sexual services. Toward that end an advertisement was posted on

backpage.com[1] on behalf of a female BPD officer posing as a prostitute. As part of the ruse that officer was stationed in a hotel room and was given a telephone with the corresponding number that was posted in the advertisement. If anyone contacted her, she would invite them to meet at the hotel room. An "arrest team" was stationed in another room that was located across the hallway. The team's role was to provide the undercover officer safety by monitoring, with equipment transmitting live audio and video surveillance, activity taking place in the undercover officer's room.

At some point thereafter, the defendant sent the undercover officer a text and initiated a conversation with her. He told her that he could "better [her] situation [and provide] housing, transportation and have the best clients that pay top dollar." He also raised the possibility that she could do "out-calls."[2] As a result, the two arranged to meet at the hotel. At roughly 8:30 P.M. on November 20, 2015, the defendant arrived at the hotel parking lot. Expecting his arrival, a different officer watched a silver car pull into the lot with three people in it. That officer observed the car park and a male exit the driver's side and enter the hotel.

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[1] The website backpage.com had become the largest marketplace for buying and selling sexual services until it was seized by Federal law enforcement agencies in April 2018.

[2] An "out-call" is when a prostitute visits the home of the client.

Shortly thereafter the defendant entered the undercover officer's hotel room, where they continued to discuss the details of the prospective arrangement, including rates, use of condoms, and transportation. During their conversation the defendant told the undercover officer that there was a woman in his car that he presently employed as a prostitute in exchange for crack cocaine. The defendant also adjusted the officer's clothing to enable him to size up her body. He was arrested soon thereafter and conceded to the officers that he "was just trying to make a few extra bucks." After the arrest, three police officers went to the hotel parking lot and approached the defendant's car with the two women in it. One of the women was indeed working as a prostitute for the defendant.

The defendant was charged with trafficking of persons for sexual servitude in violation of G. L. c. 265, § 50 (a).[3] At trial, the judge began the jury empanelment process by noting that he planned to empanel fourteen jurors, the traditional twelve jurors with two alternates, and allotted six peremptory

[3] Before trial, the judge allowed a motion in limine by the Commonwealth to introduce prior bad acts of the defendant. The defendant had two motions denied: the first was a motion to suppress concerning the recordings of his conversation with the undercover officer, and the second was a motion in limine to exclude all evidence obtained and resulting from "egregious government conduct," including the defendant's cell phone and the conversations between the police and the two females found in the car. The latter motion was denied on the grounds of inevitable discovery.

challenges to each side. Once the thirteenth juror had been selected, the judge decided to move ahead with just thirteen jurors, as opposed to his planned fourteen, due to time constraints.[4] At that point, both the Commonwealth and the defendant had used five of their six peremptory challenges. The defendant noted his objection for the record. The defendant was found guilty and now timely appeals.

Discussion. 1. Jury empanelment. The defendant's first claim regarding jury empanelment is governed by statutory language: "[a]ny irregularity in . . . [e]mpaneling . . . jurors . . . shall not be sufficient to cause a mistrial or to set aside a verdict unless objection to such irregularity or defect has been made as soon as possible after its discovery or after it should have been discovered and unless the objecting party has been specially injured or prejudiced thereby." G. L. c. 234A, § 74. See Commonwealth v. Crayton, 93 Mass. App. Ct. 251, 255 n.11 (2018).

Here, while the defendant timely raised an objection, he is unable to demonstrate any specific prejudice or injury as required under § 74. The defendant argues that the change

[4] Jury selection began at 10:10 A.M. on March 21, 2018, and the thirteenth juror was selected close to 5 P.M. From the trial transcript, the judge was aware that the court clerk had a daycare obligation at 5 P.M. that day. The judge decided to proceed with a single alternate juror rather than bring the jury pool back for another day to select the last alternate juror.

"impaired" the defendant's use of his peremptory challenges and diminished the value of his challenges. The argument, however, is undercut by the fact that thirteen jurors had already been empaneled and the defendant had exercised five of his six challenges. Coupled with that, the alternate juror was never called upon to serve as a deliberating juror. To be clear, the defendant received and exercised more than the four peremptory challenges he is statutorily afforded. See Mass. R. Crim. P. 20(c)(1), 378 Mass. 889 (1979). Additionally, the defendant makes no claim that he would have exercised his peremptory challenges any differently had he been informed from the outset that only thirteen jurors would be empaneled. Compare Commonwealth v. Beldotti, 409 Mass. 553, 561 (1991). Even if we assumed arguendo that the defendant has shown an "irregularity" in the jury selection process, he has shown no prejudice and so would not be entitled to any relief.

2. Prior bad acts evidence. The defendant also challenges the admission of prior bad acts evidence elicited from the testimony of one of the women discovered in his car, who admitted that she worked as a prostitute for the defendant. In its summation the Commonwealth relied on this testimony to argue the defendant's intentions and motives. See Commonwealth v. Helfant, 398 Mass. 214, 224 (1986) (prior bad act evidence may be introduced to show "a common scheme, pattern of operation,

absence of accident or mistake, identity, intent, or motive"). The defendant asserts that the testimony was overly prejudicial. We disagree. Indeed, the evidence was highly probative toward those ends, and not unduly prejudicial. The defendant's argument that the evidence should have been excluded because it was not needed to prove the Commonwealth's case is inconsistent with Commonwealth v. Copney, 468 Mass. 405, 413 (2014). Additionally the jury twice received a limiting instruction as to the proper use of the contested evidence. "The decision to admit the evidence of prior bad acts is committed to the sound discretion of the judge, whose determination will be upheld absent palpable error." Commonwealth v. Montez, 450 Mass. 736, 744 (2008). We see no abuse of discretion here. See Commonwealth v. Azar, 32 Mass. App. Ct. 290, 300 (1992).

3. Cross-examination. Next, the defendant claims that he was prevented from pursuing a lawful line of questioning during his cross-examination of two police officers involved in the ruse, namely, asking one officer whether he knew the act of surreptitious electronic monitoring of a conversation was against the law, and asking the other about the affidavit filed in support of the warrant application to search cell phones found in the vehicle driven by the defendant. The line of questioning was properly denied in both instances. Regarding the electronic monitoring, lay testimony is not appropriate on

questions of law, Mass. G. Evid. § 704 & note at 264 (2019). Regarding the cross-examination on the warrant affidavit, the defendant's counsel attempted to have the second officer testify as to the legal elements of human trafficking.[5] Here again, lay testimony is not appropriate on questions of law. Because this testimony, if admitted, would have infringed upon the judge's responsibility to instruct the jury on matters of law, it was properly excluded. See Commonwealth v. Sneed, 376 Mass. 867, 870 (1978) ("Apart from his duty to instruct the jury on the applicable law, a judge may state the evidence and discuss possible inferences therefrom"). Again, "[q]uestions of relevancy and prejudicial effect are entrusted to the trial judge's discretion and will not be disturbed except for palpable error." Commonwealth v. LaSota, 29 Mass. App. Ct. 15, 24 (1990).

[5] In his brief, the defendant argues that the purpose of the questioning was not to elucidate the elements of human trafficking but to show that Detective Browne "did not properly investigate the indicia of human trafficking that she claimed in her affidavit to know about." Whatever the logic, the defendant's counsel told the judge that she intended to ask Detective Browne a question regarding the "factors in what human trafficking is," and later asked Detective Browne the following questions: "Now, in your affidavit when you talk about sex trafficking, you talk about control over people, correct?" and "[w]hat's sexual servitude?" Detective Browne's understanding of the elements of human trafficking is irrelevant to the defendant's guilt or innocence, and even if it were relevant, such testimony would arguably risk confusing the jury regarding the legal elements of the charged offense. See Mass. G. Evid. § 403 (2019).

4. Inevitable discovery. Finally, the defendant challenges the denial of his motion in limine to exclude evidence "obtained as a result of egregious government conduct," including evidence discovered in the defendant's car and statements made to police by the two occupants of the car. That motion was denied on the grounds that the evidence fell under the doctrine of inevitable discovery. Because the defendant's motion in limine was predicated on constitutional grounds, we treat it as a motion to suppress. See Commonwealth v. Whelton, 428 Mass. 24, 26 (1998). For the review of rulings on motions to suppress, we accept the findings of fact, unless clearly erroneous, and independently review conclusions of law. Commonwealth v. Scott, 440 Mass. 642, 646 (2004). Under the inevitable discovery doctrine, evidence may be admissible as "long as the Commonwealth can demonstrate that discovery of the evidence by lawful means was certain as a practical matter, the officers did not act in bad faith to accelerate the discovery of evidence, and the particular constitutional violation is not so severe as to require suppression" (quotations omitted). Commonwealth v. Campbell, 475 Mass. 611, 622 (2016).

Here the Commonwealth met that standard. That the police would investigate the defendant's vehicle is assured: they watched the defendant arrive in the vehicle and exit toward the hotel, and in his discussion with the undercover officer in the

hotel room, the defendant informed her that his car was downstairs, occupied by an individual working for him as a prostitute who he paid with drugs. There exists no evidence, nor does the defendant claim, that the police, by acts of bad faith, accelerated the discovery of the evidence. See Commonwealth v. McAfee, 63 Mass. App. Ct. 467, 481 (2005). The argument is without merit.

Judgment affirmed.

By the Court (Desmond, Sacks & Ditkoff, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: March 27, 2020.

[6] The panelists are listed in order of seniority.

CERTIFICATE OF SERVICE

I hereby certify that I today filed the attached brief through the Electronic Filing Service Provider for electronic service to the following registered users:

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September 21, 2020